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Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

v.

PHILIP YOUNG, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Kendrick M. Cole, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on July 28, 1955, which affirmed the judgment of the District Court of the District of Columbia entered on October 26, 1954 granting respondents' motion for judgment on the pleadings and dismissing petitioner's amended complaint.

Opinions Below

The opinions of the Court of Appeals, *i.e.*, the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton, have not been officially reported but are set out in Appendix "C", *infra*, pp. 39-49. The opinion

of the District Court (J. A.[1] 44-53), is reported at 125 F. Supp. 284.

Jurisdiction

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 66). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Questions Presented

1. Could Executive Order 10450 validly deprive petitioner of his right to appeal his discharge from Federal employment as a "security risk" to the United States Civil Service Commission under Section 14 of the Veterans Preference Act where it is conceded that he is a loyal employee holding a non-sensitive, non-policy-making position as a Food & Drug Inspector in the Department of Health, Education and Welfare?

2. Is Executive Order 10450's standard of employee discharge (discharge mandatory unless retention is "clearly consistent with the interests of national security") consistent with the standard of employee discharge established by the Act of August 26, 1950 (discharge discretionary whenever "necessary or advisable in the interest of the national security") so as to cut off petitioner's rights under the Veterans Preference and Lloyd-LaFollette Acts?

3. The Act of August 26, 1950 vests discretion in "Agency Heads" to suspend and remove Federal employees where "necessary in the interest of national security." Does Executive Order 10450, by requiring the dismissal of all federal employees whose employment is

[1] The letters "J. A." as used throughout refer to the Joint Appendix as printed for the use of the court below.

not found to be "clearly consistent with the interests of the national security," invalidly preclude the exercise of such discretion on the part of "Agency Heads?"

4. Was the Agency Head's letter of January 15, 1954 terminating petitioner's employment as "not clearly consistent with the interests of national security," a "written statement of the decision of the Agency Head" as required by Section 1 of the Act of August 26, 1950?

Statutory Provisions and Executive Orders Involved

The statutes involved are the Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1 through 22-3, hereafter generally referred to as the "Act of August 26, 1950;" Section 14 of the Veterans Preference Act of 1944, the Act of June 27, 1944, c. 287, Section 14, 58 Stat. 390, amended August 4, 1947, c. 447, 61 Stat. 723, 5 U. S. C., Section 863, hereafter generally referred to as "The Veterans Preference Act;" Section 6(a) of the Lloyd-LaFollette Act, the Act of August 24, 1912, Section 6, 37 Stat. 555, amended June 10, 1948, c. 447, 62 Stat. 354, 5 U. S. C. Section 652(a), hereafter generally referred to as "The Lloyd-LaFollette Act." The Executive Order involved is No. 10450, April 29, 1953, 18 F. R. 2489, as amended by Executive Orders No. 10491, October 16, 1953, 18 F. R. 6583; No. 10531, May 28, 1954, 19 F. R. 3069; No. 10548, August 3, 1954, 19 F. R. 4871; No. 10550, August 7, 1954, 19 F. R. 4981, hereafter referred to as "Executive Order 10450". The statutes and the executive order in relevant parts are set forth in Appendix "A", *infra*, pp. 24-33.

Statement of the Case

A. Petitioner

Petitioner, an honorably discharged veteran, was classified as a five-point veteran's preference eligible pursuant to Section 14 of the Veterans Preference Act of 1944 (J. A. 3, 37). Prior to his suspension on November 13, 1953, he held a position in the classified civil service as Food and Drug Inspector, Food & Drug Administration, New York District, Department of Health, Education and Welfare. It is conceded by respondents that in this position petitioner had no access to any secrets of the Government of the United States, or "classified" material, and was not in a position to influence policy against the interests of the United States (J. A. 40).

On October 20, 1953, he was requested by the Chief of Personnel Security, Department of Health, Education and Welfare, to come to Washington, D. C., in connection with an investigation regarding his retention in employment pursuant to the provisions of Executive Order 10450 which established the Government employee security program. During this investigation he was asked numerous questions about his attitude, association and friends (J. A. 3, 37).

Following this investigation, on November 13, 1953, petitioner received a notice of suspension "pending investigation under Executive Order 10450" (J. A. 3, 38). The Under Secretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953, informed petitioner of the alleged reasons for his suspension and furnished him with a written statement of charges (J. A. 4, 38). The charges were:

> "1. That you established and have continued a close association with individuals reliably reported to be Communists.

"2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

"3. That you have, by your own admission, donated funds to the Nature Friends of America.

"4. That you have contributed your services in the form of work to the Nature Friends of America.

"5. That you have attended social gatherings of the Nature Friends of America."

It was conceded by respondents in the court below that petitioner was not charged with being disloyal and that none of the charges implied any disloyalty on his part.[2]

Petitioner replied to this letter of November 25, 1953, on December 23, 1953, refusing to make any explanation of the charges since they concerned "associations which I carry on as part of my private informal social life. I consider any request by the U. S. Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of 'freedom of association'" (J. A. 4, 19, 38).

On January 15, 1954, the Secretary informed him that his termination had been ordered effective at the close of business January 20, 1954, since "based on the study of all the documents in your case, including your reply to

[2] "The charges against appellant do not imply any knowing acts of disloyalty on his part . . . " * * * As appellant correctly said, 'In the charges made against me I am not accused of . . . doing or saying anything which would indicate that I am disloyal to the Government of this country'. Accordingly, there is no basis for treating appellant as a loyalty case rather than as a security risk case." (*Appellees' Brief*, pp. 6, 17.)

reference letter, it has been determined that your continued employment in the Department of Health, Education and Welfare is not clearly consistent with the interests of national security" (J. A. 5, 21, 38).

On January 27, 1954, petitioner, by his counsel, wrote the Secretary requesting a reopening of petitioner's case and a hearing. The request was based on the ground that petitioner wrote his letter of December 23, 1953, declining to answer the charges, while recovering from an operation for an esophageal diverticulum which caused petitioner to suffer an emotional and physical unbalance (J. A. 5-6, 22-26, 38).

On January 29, 1954, petitioner, by his counsel, supplemented the letter of January 27, stating that if the case were reopened he would prove that he had not knowingly maintained any close or sympathetic association with any member of the Communist Party, that his relations with an organization known as the Nature Friends of America, which constituted four of the five charges, were at once casual, intermittent and entirely innocent, and in fact that petitioner had specifically refused to become a member of the organization and had only used its facilities for outdoor recreation (J. A. 27).

On February 4, 1954, the Secretary wrote counsel for petitioner denying his request for a reopening of his case, although she stated: "I have reviewed the information which you have forwarded in support of your request, as well as other available information" (J. A. 28). On February 10, 1954, counsel for petitioner again wrote the Secretary requesting reconsideration of the refusal to reopen. In this letter the offer of proof of January 29, 1954, was repeated and amplified. In addition, counsel pointed out the insufficiency of the original charges and questioned the constitutionality of Executive Order 10450 and the Act of August 26, 1950, U. S. C. Section 22-1, *et seq.*, on which the Executive Order was in part based (J. A. 29-31). The

Secretary denied this second request on February 24, 1954, saying "The substantive information of your letter of February 10 was considered at the time of the determination" (J. A. 32); and that the separation of Mr. Cole had been accomplished in accordance with Executive Order 10450 and the security regulations of the Department; and that the validity and constitutionality of the Executive Order and the Act of August 26, 1950 (64 Stat. 476), upon which it is based, were not matters to be determined by the Department (J. A. 8, 32, 39).

On February 25, 1954, petitioner appealed his discharge to the Second United States Civil Service Region claiming that his discharge was in violation of Section 14 of the Veterans Preference Act and the Rules and Regulations of the Civil Service Commission in that: (1) he was not furnished with any and all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954 as supplemented, was arbitrary, capricious, and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and not made in good faith (J. A. 8-9, 39).

On March 3, 1954, the Regional Director advised petitioner that he could not accept his appeal inasmuch as "The Commission has held that the provisions of Section 14 of the Veterans Preference Act of 1944 are not applicable to suspension or termination of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733 (81st Congress, the Act of August 26, 1950). Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated

under Executive Order 10450" (J. A. 9, 33-34, 39). On May 5, 1954, the decision of the Regional Director was approved by the United States Civil Service Commission, to which it had been appealed (J. A. 9, 35-36, 39).

B. Court Proceedings

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his discharge by the Secretary of Health, Education and Welfare pursuant to the provisions of Executive Order 10450, and for a declaration that the refusal of respondent Young, Chairman of the United States Civil Service Commission, to hear petitioner's appeal from the Secretary's adverse determinations was illegal. Petitioner prayed further for an Order restoring him to his position as a Food and Drug Inspector as of the date of his discharge.

An answer was filed on August 30, 1954. On September 8, 1954, an Order was entered granting petitioner's motion to amend his complaint by adding as parties defendant George M. Moore and Frederick J. Lawton, members of the United States Civil Service Commission. It was stipulated by counsel that the answer which was filed was adopted by the additional defendants.

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the District Court granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (J. A. 53). Jurisdiction of the cause in the District Court was based on 28 U. S. C., Sections 1331, 2201 and 2202. The Court of Appeals, by a 2-1 vote, affirmed, Judge Edgerton, dissenting (Appendix "C", *infra*, pp. 39-49).

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and millions of Government employees. The decision of the court below removes from Government Service as a "security risk" a concededly loyal employee who had no access to any Government secrets or classified information and who occupied a position not involving the making of policy. Inasmuch as the criteria of Executive Order 10450 (Appendix "A", *infra*, pp. 31-33), cover virtually every aspect of "employee suitability", the decision below deprives millions of Government employees of the procedural safeguards of the Lloyd-LaFollette and Veterans Preference Acts whenever it is asserted in the name of "security" that they are "unsuitable" for Federal employment.[3]

In petitioner's case, the ruling of the court below deprived him, among other things, of the right to appeal to the Civil Service Commission.[4]

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[3] There are now approximately 2,300,000 federal employees covered by the security program. From May 28, 1953, through September 30, 1954, 3,002 federal employees were terminated under Executive Order 10450. Of those terminated, 1,645 occupied "nonsensitive" positions. (*Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong. 1st Sess., March 16, 1955, pp. 515, 533, 569-570).

[4] Petitioner was covered by Section 14 of the Veterans Preference Act, which provides for written notice of an employee's removal, together with any and all the reasons therefor, at least 30 days in advance of the proposed action, and a written statement of the decision of the Agency Head, as a condition precedent to a valid discharge. In addition, the statute grants petitioner the right to an appeal hearing before the Civil Service Commission on *all procedural and substantive grounds*. The Commission's decision on appeal is binding on the removing officer. Petitioner was also covered by Section 6(a) of the Lloyd-LaFollette Act. Both statutes, in relevant parts, are set out in Appendix "A", *infra*, pp. 26-28.

The issues, which this Court is asked to decide for the first time, arise from the Federal Employees' security program, based upon the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1 to 22-3). As stated by Judge Edgerton in his dissent below:

> "In the Lloyd-LaFollette Act and the Veterans Preference Act, Congress limited the President's control over removals (from the classified civil service). No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations 64 Stat. 476, 5 U. S. C. 22-1, 22-3. The question is whether this case is within the exceptions." (Appendix "C", *infra*, p. 45.)

On all the questions raised by petitioner below, the Court of Appeals was divided. Petitioner contends, with Judge Edgerton, that the majority erred. His challenge is not premised upon any "right" to federal employment, but upon procedural rights enacted by Congress for the benefit of civil servants in the Veterans Preference and Lloyd-LaFollette Acts and in the Act of August 26, 1950, itself. He contends that these rights were violated and that his dismissal was without legal justification.

I.

The court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) The Act of August 26, 1950 (64 Stat. 476, 5 U. S. C., Secs. 22-1, 22-3), as extended by Executive Order 10450, authorizes the dismissal of any government officer or employee "in the interests of national security". The District Court held that there was justification for dismissing petitioner "in the interests of national security", stating

that "conceivably it is within the realm of possible contemplation" that a Food and Drug Inspector might impair the public health (125 F. Supp. 284, 288). The only way petitioner could impair the public health was if he intentionally contaminated food he was required to inspect or if he intentionally failed to report evidence of contamination. In other words, if petitioner were disloyal, there was an exceedingly remote possibility that he might sabotage the food supply during time of national emergency. But respondents conceded in the court below that petitioner was not charged with disloyalty. Nevertheless, the majority opinion of Judge Prettyman held that the plain meaning of the statute authorized petitioner's dismissal.

We believe, on the conceded facts, that it was *not* "within the realm of possible contemplation" that petitioner's discharge could be justified "in the interests of the national security of the United States" and that the action of the Agency Head in dismissing petitioner under the statute on these facts is an apparent conflict with the principles enunciated by this Court in *Ex Parte Mitsuye Endo*, 323 U. S. 283, 300-301. Cf. *Weiman* v. *Updegraff*, 344 U. S. 182.

Whether a loyal employee, employed in an Agency which is not primarily concerned with vital matters affecting the national defense or security and who has no access to any government secrets or classified information and who occupies a position where he cannot influence policy against the interests of the United States, can be dismissed under a statute which authorizes dismissal "in the interest of national security" is an important question of Federal law which has not been, but should be, settled by this Court.

(b) Section 1 of the Act of August 26, 1950 provides that an Agency Head:

> "... may ... when deemed necessary in the interest of national security ... suspend ... *any civilian*

officer or employee" and "may . . . terminate the employment of such suspended civilian officer or employee whenever he shall deem such termination necessary or advisable in the interest of the national security of the United States." (emphasis supplied).

The court below held that the "any civilian officer or employee" provision was unlimited in application. Judge Edgerton dissented sharply with the majority on this issue. We think the statute limits the "any civilian officer or employee" provision to those situations where termination is "necessary or advisable in the interest of the national security of the United States". Whatever these words mean, and we think them not free from vagueness or difficulty, we believe that the Act's legislative history clearly demonstrates that Congress never intended it to apply to petitioner, a concededly loyal employee, holding a non-sensitive, non-policymaking position in an agency not primarily concerned with vital matters affecting the nation's military, foreign affairs or related programs. (See, e.g., *H. Rep. No. 2330*, 81st Cong., 2nd Sess., pp. 3-5; *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2; *S. Rep. No. 1158*, 80th Cong., 2nd Sess., pp. 3-4; *H. Rep. No. 2264*, 80th Cong., 2nd Sess., p. 2; *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 10, 18, 21, 25, 41, 43, 60, 67; *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, pp. 7, 8, 17; *Hearings, Senate Committee on Armed Services on S. 1561*, 80th Cong., 2nd Sess., February 27, 1948, pp. 14-16.

In enacting the Lloyd-LaFollette and Veterans Preference Acts, Congress limited the President's control over removals. In enacting the Act of August 26, 1950, Congress created certain exceptions to the limitations created by the Lloyd-LaFollette and Veterans Preference Acts. We think the Act of August 26, 1950, limited the applicability

of the Lloyd-LaFollette and Veterans Preference Acts to cases other than those where removal was necessary or advisable in "the interest of the national security". The same limitation applied to extensions of the Act to other agencies and branches under Section 3 thereof. The intent of Congress as manifest in the history of the law; the common understanding of the Act as evidenced by considered administrative interpretations and by the obvious connotation of the words "interest of the national security"; and relevant judicial authority—all urge the same conclusion: the statute cannot be applied where there is no nexus between the employment and the nation's defense, preparedness, and similarly related programs. (See "*A Report by the Inter-Departmental Committee on Internal Security on the Government Employee Security Program*", April 29, 1952 [Whitehouse Mimeograph Release No. 3326; August 8, 1952, pp. 13-16, 27], relevant portions of which are set forth in Appendix "B", *infra*, pp. 34-38).

Petitioner contends that on the conceded facts, the extraordinary authority granted Agency Heads by the Act of August 26, 1950 could not be used to discharge him summarily on the grounds of security. If his discharge on some other ground or under some other authority was desired, he was entitled to all of the procedural rights provided him by the Veterans Preference and Lloyd-LaFollette Acts. In creating an exception to those rights, Congress had the power to limit the exception as it previously had the power to create the rights thus excepted to. Yet in firing respondent pursuant to the mandate of Executive Order 10450, respondent Hobby ignored the plain limitations of her statutory authority. If she was free to do so, then the Executive is at liberty to ignore any Congressional limitation on the manner in which it may fire employees, and civil service laws can be repealed by Presidential fiat. The court below intimated that this

was so. But such a fundamental issue is surely for this Court to decide.

The exient to which the Act of August 26, 1950, supersedes the Veterans Preference and Lloyd-LaFollette Acts is an important question of Federal law which has not been, but should be, settled by this Court. Inasmuch as the decision below affects the entire Federal Civil Service, it is of such vital public importance as to require this Court to grant certiorari.

(c) The Act of August 26, 1950, in providing that a stated group of department and agency heads "may, in [their] absolute discretion and, when deemed necessary in the interest of the national security, suspend, without pay any civilian officer or employee . . .", is permissive in application. The use of the words "absolute discretion" leaves little doubt that Congress intended the Agency Head to make the sole determination as to the extent of the Act's application within his own agency whenever it was necessary or advisable in the interest of the national security.

The Act of August 26, 1950, mentions the President only twice; Section 3 (5 U. S. C., Section 22-3), provides that the Act shall apply to agencies and departments other than those referred to in Section 1, "as the President may, from time to time deem necessary in the best interests of national security", and that the President shall report to Congress on any such extensions to other agencies and departments. For the rest, the statute is a direct grant by Congress to the agency and department heads covered under it and is permissive in application. The President is given no authority to limit, vary or enlarge this grant, nor is he authorized to divest an agency head of his absolute discretion to determine, under the standard—when "necessary or advisable in the interest of the national

security", the extent of the Act's coverage within the confines of his own department.[5]

A comparison of this limited grant of power with the mandatory provisions of the Executive Order (see Executive Order 10450, Sections 4, 5, 6 and 7) discloses that the discretionary application of the statute has been transformed into the mandatory requirements of Executive Order 10450. We think these changes clearly deprive an agency head of his "absolute discretion" to determine the

[5] We think this was made clear by Assistant Attorney General Tompkins during the recent hearings before the senate sub-committee to establish a Commission on Government Security:

"Senator Cotton: Mr. Tompkins, I asked you about the matter of coordinating, and making uniform the procedure in the various departments, and what, if anything, could be done to bring that about.

"Am I correct in my understanding that the Congress in its infinite wisdom has written into the law that each department head has complete authority in determining procedures in his department in connection with security?

"Mr. Tompkins: You are referring to Public Law 733, 81st Congress, I think, Senator, in which the final responsibility is vested in the head of the department or agency. That is correct.

"Senator Cotton: So that under the present law, neither the Civil Service Commission nor the Department of Justice, nor anyone else, can say to a department head, 'You shall inaugurate changes of practices or systems in your clearance of your employees.'

"Mr. Tompkins: That is correct.

"Senator Cotton: And even the President of the United States could not say to a department head, 'You shall incorporate certain new systems in your department'; though he might say to the Secretary, 'If you do not do it, I shall find a new secretary.'

"Mr. Tompkins: That would be correct, Senator."

(Hearings, *Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 8, 1955, at pp. 59-60.)

extent of the statute's application within his own agency whenever necessary or advisable in the interests of national security. Cf. *Miller* v. *United States*, 294 U. S. 435, 440.

The court below split sharply on this question. The majority believed that petitioner's argument was that, since the statute places discretion in the "Agency Head", the President had no power to issue an order on the subject; but that, since Congress was presumed to have known that subordinate officers of the Executive Branch acted under direction of the President, it had this fact in mind when it conferred discretion on the Agency Heads in the statute. Judge Edgerton, dissenting, believed that the statute applied only to agencies which were "sensitive" or become so in the future.

We believe the majority's conclusion is at odds with any proper construction of the law. Assuming, *arguendo*, that the President had the power to extend the Act of August 26, 1950, to each and every Agency of the Government, we believe he had no power whatever to extend the statute to *each and every employee* in each and every Agency, under a rigid single standard which precluded the exercise of any discretion on the party of the Agency Head, irrespective of the degree to which the employee's position affected the national security.[6]

We think the division in the court below on this issue is the result of a misunderstanding of the legislative scheme embodied in the Act of August 26, 1950. We believe that the legislative scheme requires flexible standards for

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[6] Cf. Statement of former Senator Harry P. Cain, member of the Subversive Activities Control Board, *"Washington Post"*, January 16, 1955: "This criterion that an accused applicant or employee must meet the test that his employment is 'clearly consistent' with the interest of the [national security]; constitutes a burden which can hardly be borne by anyone. . . . Any system through which men and women are judged must provide the judges with room for judgment and discretion."

Federal employees, depending upon the extent to which the national security interest permeates the agencies in which they are employed, and the particular positions held by them within those agencies. While we agree with Judge Prettyman that the President clearly had the right to direct his subordinates to exercise their "absolute discretion" in a manner consistent with the statute, we do not agree that he had the right to deprive them of that discretion by requiring the dismissal of each and every employee who did not meet the mandatory Presidential standard—a standard more onerous than that provided by the Congress. (See *United States, ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260.) This issue does not involve the naked exercise of the Executive power. (*Kendall* v. *United States, ex rel. Stokes*, 12 Pet. 524, 37 U. S. 524.) Rather, it involves that aspect of the Executive power which Congress has the right to reasonably restrict, regulate and direct. (See *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52.)

In this connection, we think the President's order was not an exercise of the Executive power, but an unauthorized amendment of the Veterans Preference and Lloyd-La-Follette Acts and that his action violated the principles enunciated by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

Whether Executive Order 10450 invalidly deprived various Agency Heads of a discretion vested directly in them by a Congressional exception to the President's removal power under the Constitution is an important question of Federal Law which has not been, but which should be, settled by this Court.

II.

The court below has decided Federal questions in a way in conflict with applicable decisions of this Court.

(a) Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* . . ." (emphasis supplied).

The Executive Order, on the other hand, establishes a different standard for retention or termination, namely, that unless retention is established affirmatively to be "clearly consistant with the interests of the national security", the employee *must* be terminated. (See Executive Order 10450, Sections 2, 4, 5, 6 and 7.)

As has already been stated, the power granted to the President by the Act of August 26, 1950, Section 3, was limited to an extension of Section 1 to departments and agencies not initially made subject to the Act. We think the President had no authority to revise the statutory standard to be used by agency heads in arriving at a particular determination, for, even if it be conceded that the President could extend the provisions of the Act of August 26, 1950 to every department and agency head of the Federal Government, it is obvious that he could not prescribe

standards thereunder more onerous than those established by Congress. (See *Morrill* v. *Jones*, 106 U. S. 466; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 616, 618.)

Thus, when respondent Hobby applied Executive Order 10450 to petitioner, which the Executive Order required her to do, and found that it required his dismissal, a more onerous standard of judgment ("clearly consistent with the interests of the national security") was used than that provided by the Act of August 26, 1950 ("necessary or advisable in the interest of the national security"). Indeed, the Agency Head never made a determination that petitioner's dismissal was "necessary or advisable in the interest of the national security of the United States", the standard established by Congress. Elsewhere, the court below has noted that such a change of standard can be decisive of an employee's loyalty or security status. (See *Jason* v. *Summerfield* [C. A. D. C.] 214 F. 2d 273, 276, cert. den. 348 U. S. 840).

Judge Edgerton's dissent points out that the standard of Executive Order 10450 "differs vitally from the 'necessary or advisable' test that Congress prescribed".

> "The difference is closely paralled to that between the test, 'reasonable grounds exist for belief that the person involved is disloyal', used in Executive Order 9835; and the test, 'There is a reasonable doubt as to the loyalty of the person involved', used in the later Executive Order 10241. As this court has held, that 'amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal', does cause a reasonable doubt as to whether he is in fact loyal * * * Just so here, the amended standard applied a more rigid test of suitability for government employ-

ment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is 'necessary or advisable in the interests of national security', does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be, he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veteran's Preference Act." (Appendix "C", *infra*, pp. 47-48.)

We believe that the action of the Agency Head in dismissing petitioner under this more onerous standard was in direct conflict with the principles enunciated by this Court in such cases as *Miller* v. *United States*, 294 U. S. 435; *Waite* v. *Macy*, 246 U. S. 606, 609 and *Jones* v. *Securities Exchange Commission*, 298 U. S. 1, 21-22.

By reason of its effect on the entire Federal Civil Service, the question whether the standard established by Executive Order 10450 is consistent with the Act of August 26, 1950, is of paramount significance. The court below has decided this question in a way in conflict with applicable decisions of this Court.

(b) This Court will note that the notice of dismissal terminating petitioner's employment failed to set forth any of the reasons for the Agency Head's determination. We believe, as did Judge Edgerton, that this notice of dismissal was not "a written statement of the decision of the Agency Head" which is required by the Act of August 26, 1950. Judge Edgerton's dissent points out that:

> "* * * The letter telling appellant he was dismissed, but not telling him why, was evidently not a 'written statement of the decision' as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given, no safeguard is provided." (Appendix "C", *infra*, p. 49.)

We think the action of the Agency Head in not furnishing petitioner with the reasons for his removal is in direct conflict with the principles enunciated by this Court on various occasions. (See *e.g.*, *Securities Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Securities Exchange Comm.* v. *Chenery Corp.*, 322 U. S. 194, 196-197; *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 498, 511; *Florida* v. *United States*, 282 U. S. 194.)[7]

Because of its effect on millions of government employees, the meaning of the Act of August 26, 1950's requirement that an employee have a "written statement of the decision of the Agency Head" should be resolved by this Court, not only because it is a vital issue of Federal law, but because the decision below represents a basic departure from the applicable decisions of this Court which enunciate the principle that reasons for an executive agency's action, taken pursuant to conditions laid down by Congress, must be set forth in its decision.

---

[7] The majority holding below conflicts with its own holding in *Lambros* v. *Young* (C. A. D. C.), 145 F. 2d 341, 343, ftn. 2, where the Court quoted with approval, "The decision . . . is the basis upon which the judgment of the court rests."

Conclusion

Twice before this Court has granted certiorari on the constitutional issue of the right of confrontation and cross-examination under the "Loyalty Program" established by Executive Order 9835 (*Bailey* v. *Richardson*, 339 U. S. 977; *Peters* v. *Hobby*, 348 U. S. 882).

This case does not involve that question, but raises companion issues of equal, if not greater, significance.

These questions affect all of some 2,300,000 Federal employees, but they are of particular, frequently decisive, importance to the hundreds of thousands of loyal public servants whose employment has no conceivable nexus to our national security. Already there have been hundreds of such persons who like petitioner have been discharged or who are presently awaiting decision on their security status.[8] A large percentage of all Federal employees are now directly governed by the decision below.[9]

In the light of the grounds for removal set forth in Section 8(a) of Executive Order No. 10450, as amended, the pragmatic effect of the decision below will permit the virtual cashiering of any civil servant for unstated reasons which may have no possible justification in considerations of the national security. Moreover, since such a discharge is dishonorable, its stigma may permanently cripple the victim's reputation and earning capacity. Executive authority to work such consequences, in derogation of previously established statutory guarantees to civil serv-

[8] See Note 3, *supra*, at p. 9.

[9] Since actions against Agency heads to contest discharges must generally be brought in the District of Columbia for reasons of jurisdiction and venue, the division in the court below has added significance.

ants, should not be lightly implied. Petitioner asserts, as did Judge Edgerton, that it does not exist. The questions which he raises are ones which this Court should decide.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1, *et seq.*, Public Law 733, 81st Cong. 2nd Sess.

5 U. S. C. SECTION 22-1: (PUBLIC LAW 733, SECTION 1)

Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency

head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any

person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * *

5 U. S. C. Section 22-3: (Public Law 733, Section 3)

The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

* * *

Act of June 27, 1944, c. 287, Section 14, 58 Stat. Section 14 of the Veterans Preference Act, 5 U. S. C., Section 863.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons,

specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .

* * * * * * *

Act of August 24, 1912, c. 389, Section 6, 37 Stat. 555, as amended June 10, 1948, c. 447, 62 Stat. 354, Section 6(a) of the Lloyd-LaFollette Act, 5 U. S. C., Section 652(a).

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on

such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reason for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission . . .

* * *

EXECUTIVE ORDER No. 10450

Apr. 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, Oct. 15, 1953, 18 F. R. 6583; Executive Order No. 10531, May 27, 1954, 19 F. R. 3069; Executive Order No. 10548, Aug. 3, 1954, 19 F. R. 4871; Executive Order No. 10550, Aug. 6, 1954, 19 F. R. 4981.

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYEES

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privilege to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * *

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the reten-

tion in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security which finding shall be

made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another

government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

* * * * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

* * * * * * *

APPENDIX "B"

A REPORT

BY THE

INTERDEPARTMENTAL COMMITTEE ON INTERNAL SECURITY

ON

THE GOVERNMENT EMPLOYEE SECURITY PROGRAM

AS SUBMITTED TO

THE PRESIDENT

BY THE

NATIONAL SECURITY COUNCIL

(April 29, 1952, White House Mimeograph Release No. 3326, August 8, 1952)

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* * *

IV. CONCLUSIONS

1. *An employee security program must be limited to the legitimate interest of national security.* Section 6 of the Act of August 24, 1912 (Lloyd-LaFollette Act) provides for the suspension and removal of employees from the classified service "for such cause as will promote the efficiency of such service." Historically, the rules and regulations of the Civil Service Commission have provided that appointment in the competitive service may be denied to applicants for a number of reasons. These reasons, which are generally referred to as relating to "suitability," are listed in section 2.104 of the Commission's regulations. They include the standard which is prescribed in Executive Order 9835 to govern denial of or removal from employment on the grounds of loyalty. The same grounds which justify denial of appointment in the competitive civil service will also justify removal of an employee from that service.

It may be seen, therefore, that even in the absence of an employee security program or security legislation, a person may be denied employment, or removed from employment, in the Federal civil service for a number of reasons. This has led many persons to question the need for a formal "security" program, superimposed on the existing programs relating to loyalty and suitability. It is the opinion of the Committee that an employee security program is justified, *within limits*, in order to afford the fullest possible protection to the national security. A program such as may be established under Public Law 733, affords the necessary authority to agency heads for getting questionable employees quickly out of sensitive positions when other remedies are not available. It also permits appropriate action to be taken to protect the Government against persons who may knowingly or unknowingly endanger the national security even though there may not be "reasonable doubt" as to their loyalty.

An employee security program, as in the case of the Employee Loyalty Program, is a special program which can be justified in these times. As such, it must be applied only to the extent required "in the interest of national security." Further, it is not required as, nor should it become, a substitute for the programs which have been established to handle cases of applicants or employees of doubtful loyalty or doubtful suitability.

Not all departments and agencies of the Government will have need of an employee security program since the national security, in the sense contemplated, will not be involved in their operations. Public Law 733 provides authority to suspend and remove employees "in the interest of the national security." This authority is limited to those departments and agencies named therein and to such other departments and agencies as may be designated by the President "in the best interests of national security." Obviously, it was the intention of the Congress to limit the

application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in position to endanger or compromise the national security. The term "national security" is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies. In a general sense, it appears that "national security" as used in Public Law 733 relates to the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action. . . . Any act, or failure to act, which would have the effect of weakening or compromising this ability can be said to endanger the national security. Any department or agency whose functions are such that acts, or failures to act, on the part of employees would have this effect will have need of an employee security program.

On the other hand, acts or failures to act which would have no direct bearing upon the ability of the country to protect and defend itself against hostile or destructive action, cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in connection with an employee security program.

Furthermore, even in those departments and agencies which have need of an employee security program, not *all* positions in the department or agency will necessarily be

concerned with the "national security," and therefore not all employees will be in a position to compromise or endanger the national security. The program must be applicable only with respect to those positions, which may be designated as "sensitive positions," whose incumbents might be in position to endanger the national security.

These facts will serve to limit an employee security program to: (1) Those departments or agencies, or parts thereof, whose functions are concerned with the "national security"; (2) Those positions which may be designated as "sensitive"; and (3) Those adverse actions against employees in or applicants for sensitive positions which cannot appropriately be taken either under the loyalty program or for reasons of general suitability under civil service rules and regulations (pp. 13-16).

* * *

V. Recommendations

1. In the interest of promoting uniformity in determining the need for and the extent of employee security programs in the various departments and agencies there should be definitions of the key terms "national security" and "sensitive position." For this purpose the following definitions are recommended:

> The term *national security* as used herein relates to the safeguarding of the United States against any attempt to destroy or weaken it by force or violence, subversion, or any other means. Within the area required to be safeguarded are military, foreign relations, and related matters of the Government, the disclosure or compromise of which would aid our enemies or would endanger our defense. As used herein the term national security does not include questions of policy or judgment with respect to other Government matters relating to the general welfare, health and happiness of our people in their economic

and political life, not requiring security classification. *Sensitive position* means (1) Any position the duties or responsibilities of which require that the incumbent have access to security information or material, classified "Confidential", "Secret" or "Top Secret"; and (2) Any position which exists in an organizational entity where, because of the nature of the work being done, the very presence of the incumbent would make it possible for him to obtain possession of security information or material, classified "Confidential", "Secret" or "Top Secret", or to commit acts which would directly endanger the national security.

2. The head of each department and agency of the Federal Government should be responsible for identifying the sensitive positions, if any, in his department or agency, using the uniform definition of "sensitive position."

3. Based upon his review and identification of sensitive positions, the head of each department and agency to which Public Law 733, 81st Congress, is not already applicable should decide whether, in his opinion, there is need for an employee security program in his department or agency. If he decides after consultation with ICIS that such program is necessary, he should request issuance of Executive Order authority through normal channels for extension of the provisions of Public Law 733 to his department or agency.

4. Employee security programs should not be construed to replace, change or otherwise modify the Federal Employee Loyalty Program or the laws, and the rules and regulations of the Civil Service Commission, relating to suitability for employment in the competitive civil service. In any individual case the program most properly applicable should be utilized for its disposition (pp. 27-28).

APPENDIX "C"

Opinion of the Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12526

KENDRICK M. COLE,

Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 28, 1955

Before EDGERTON, PRETTYMAN and BASTIAN, Circuit *Judges.*

PRETTYMAN, *Circuit Judge.* Appellant Cole was a five-point veterans' preference eligible employed in the classified Civil Service as a food and drug inspector in the Department of Health, Education and Welfare. After an investigation pursuant to Executive Order 10450 [1] he received a written statement of charges, which were, generally speaking, that he had continued in close association with individuals reliably reported to be Communists and

[1] 3 C. F. R. 72 (Supp. 1953).

had donated to and attended meetings of an organization designated by the Attorney General under Section 12 of the Executive Order. He replied to this letter, declining to make any explanation of the charges, saying that the request of the Government was an invasion of his private rights and of his right of freedom of association. His letter was forwarded to the Secretary, who ordered that his employment be terminated. Some two weeks later Cole, by his counsel, wrote the Secretary, asking a reopening of the case and stating that if it were reopened he would prove that he had not knowingly had the associations or relations which were alleged. The Secretary denied the reopening and later denied a second request for a reopening. Cole appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act,[2] but the Director would not accept the appeal. The Commission approved the Director's decision, holding that Act not applicable to dismissals under Public Law 733.[3] Thereupon Cole filed a civil action in the District Court, praying for a declaratory judgment and for an order restoring him to his position. The District Court, with an exhaustive opinion,[4] granted the defendants' motion for judgment on the pleadings, dismissing the complaint for failure to state a claim upon which relief could be granted.

Upon his appeal to this court Cole makes three principal points, and the Government makes one additional point, which it raised in its motion for judgment on the pleadings. It says Cole failed to exhaust his administrative remedy and so his action in court must fail. While Cole failed to pursue the administrative remedy

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[2] 58 Stat. 390 (1944), as amended, 5 U. S. C. A. § 863.

[3] 64 Stat. 476 (1950), 5 U. S. C. A. § 22-1 *et seq.*

[4] Cole v. Young, 125 F. Supp. 284 (1954).

offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken.

Cole's first point is that the President could not extend the summary dismissal provisions of Public Law 733 to employees holding non-sensitive, non-policy-making positions in a Department such as Health, Education and Welfare. He makes an extensive argument based upon the congressional debates and several writings in the field, plus a rationalization of the purposes of such a statute. The trouble with the argument is that the statute itself is explicit on the point. It provides:

> "SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." [5]

The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, *supra*, makes the statute applicable to other departments, he makes the "any civilian" provision applicable.

The foregoing is entirely constitutional. The Constitution vests all executive power in one person, the President. It provides: [6] "The executive Power shall be vested in a President of the United States." His is a lone, personal responsibility in so far as carrying out

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[5] 64 Stat. 477 (1950), 5 U. S. C. A. § 22—3.

the laws which Congress has enacted is concerned. The business of the Congress is to make laws. The business of the President is to carry them out. Authority is ordinarily a concomitant of responsibility. But we need not here venture into the intricacies of executive-legislative relationship in respect to executive employees. It is enough to say that, when the Congress recites that the President may dismiss summarily executive employees whenever he deems dismissal necessary or advisable in the interest of the national security, the enactment is valid. The policies to be pursued in the matter by the Congress and by the President are for them to determine, not for us.

Cole's second point is that Public Law 733 at most authorizes summary dismissal when such termination of employment is "necessary or advisable in the interest of the national security", while Executive Order 10450 requires agency heads to insure that the retention of any employee "is clearly consistent with the interests of the national security." He says the latter quoted clause is not within the former and, therefore, the Order is not within the statute. But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute; and this is quite apart from the consideration that the President may have such power (to dismiss executive employees whose retention he deems not clearly consistent with the national security) as a part of the direct constitutional grant of "executive power". There

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Art. II, § 1, cl. 1.

is a line somewhere beyond which Congress cannot go in enacting prescriptions in respect to executive power over executive employees. It might be, for example, that, if Congress required the hiring of executive personnel whose employment the President deemed not consistent with the national security, the enactment would be void. Congress has the power to make the laws and so can make laws concerning Government employ; but the President has the power, and so the responsibility, of carrying out all the laws, and Congress cannot impinge upon that power. There is a boundary between the two powers. We do not have that problem in our view of the case. We advert to it because of the view expressed by our dissenting judge. If we were of his view and thought the President's Order inconsistent with the act of the Congress, we would have to decide the constitutional question thus presented.

Cole seems to argue that, since the statute places the discretion in the "agency head", the President had no power to issue an Order upon the subject. In the first place, this is an executive matter and, if Congress had means to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a

superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps, if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

Cole's third point is that his notice of dismissal was not the required "written statement of the decision of the agency head". Public Law 733 provides that an employee proposed for suspension "shall be notified of the reasons for his suspension". Cole does not, and could not, complain about the sufficiency of the statement given him at this point. Then the statute provides that an employee proposed for dismissal shall receive five things, the first of which is a statement of the charges against him and the last a written statement of the decision of the agency head. Cole does not claim he did not get a written statement of the charges against him or that the statement given him was inadequate. His claim is that the letter of the Secretary which advised him his employment had been ordered terminated, "based on the study of all the documents in your case, including your reply to reference letter," was not a compliance with the statute as above quoted.

We are all familiar with the difference between "opinions" and "decisions" in judicial matters. "Opinions" state the reasons, and "decisions" merely state the actions taken. The statute here used a well-known word, and we give it its well-known meaning.

Cole claims the applicability of *Mulligan* v. *Andrews*,[7] but the statute there involved required a statement of the

[7] 93 U. S. App. D. C. 375, 211 F. 2d 28 (D. C. Cir. 1954).

"reasons" for removal. The statute now before us does not so provide in respect to the final step in a termination of employment.

The judgment of the District Court dismissing the complaint is

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* As we held a year ago, enforcing the Lloyd-LaFollette Act's requirement that "No person in the classified civil service of the United States shall be removed" without notice and reasons in writing: "The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear." *Roth* v. *Brownell*, U.S. App.D.C. , , 215 F. 2d 500, 502. It does not follow, of course, that Congress could impose absurd and crippling limits. But this is irrelevant here.

In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals. No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations. 64 Stat. 476, 5 U.S.C. §§ 22-1, 22-3. The question is whether this case is within the exceptions. I think it is not, for three reasons.

1. The exceptions do not cover the Food and Drug Administration, in which the appellant was employed.

The Act of 1950 provides in § 1: "Notwithstanding the provisions of section 652 of this title [Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board;

or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee . . . ." Section 1 also provides that a suspended employee may be dismissed if the agency head thinks it "necessary or advisable in the interest of the national security". Section 3 provides that the Act "shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."

In Executive Order No. 10450 the President, ostensibly "deeming such action necessary in the best interests of the national security", undertook to extend the Act to "all other departments and agencies of the Government". I think this blanket extension unauthorized and invalid. Congress had specified some agencies that have something to do with national security. Committee reports describe them as "sensitive" or "concerned with vital matters" affecting national security. H.R.Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950); S.Rep. No. 2158, 81st Cong., 2d Sess. 2 (1950); S.Rep. No. 2264, 80th Cong., 2d Sess. 2 (1948). Evidently Congress thought some other agencies might likewise be concerned with national security. Accordingly Congress authorized the President to extend the Act. There is, I think, not the slightest reason for supposing that Congress intended to authorize the blanketing in of all agencies. A committee report said: "the bill makes ample provision for the employment in nonsensitive agencies of certain of those employees who may be classified in sensitive departments and agencies as security risks." H.R.Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950). Accordingly Section 1 of the Act provides "That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment

in any other department or agency of the Government . . . ." Since many agencies, including the Food and Drug Administration in the Department of Health, Education and Welfare, in which the appellant was employed, have nothing to do with national security, the Act of 1950 has nothing to do with them. The authorization to bring "other" departments and agencies within the Act should be recognized, in accordance with the purpose and intent of Congress, as limited to those that might reasonably be deemed "necessary in the best interests of national security." It could not reasonably be deemed necessary in the best interests of national security that employees in all agencies, including not only the Food and Drug Administration but the Fish and Wildlife Service, be subject to summary unappealable dismissal.

The Supreme Court has said regarding the "plain meaning" of an Act of Congress: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

2. The Act of 1950 authorizes the head of an agency covered by the Act to dismiss suspended employees "whenever he shall determine such termination necessary or advisable in the interests of the national security". Appellant's agency head did not make that determination concerning the appellant, but determined only that appellant's continued employment "is not clearly consistent with the interests of national security". In Executive Order 10450 the President purported to adopt the "clear-

ly consistent" test, but he had no authority to adopt it. It differs vitally from the "necessary or advisable" test that Congress prescribed.

The difference is closely parallel to that between the test, "reasonable grounds exist for belief that the person involved is disloyal", used in Executive Order 9835, and the test, "There is a reasonable doubt as to the loyalty of the person involved", used in the later Executive Order 10241. As this court has held, that "amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal." *Jason v. Summerfield*, [illegible] U.S.App.D.C. [illegible], 214 F. 2d 273, 276, *cert. denied*, 348 U.S. 840.[1] Just so here, the amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is "necessary or advisable in the interests of national security", does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veterans' Preference Act.

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[1] The Court found the difference so essential that employees who had been cleared under the old standard might be reexamined and dismissed under the new one.

3. The procedure used in appellant's dismissal does not even comply with the Act of 1950. Even that Act requires "a written statement of the decision of the agency head". Frequently, in legal connections, "decision" means not only a result but the reasons for the result.[4] The Administrative Procedure Act follows this usage. It requires that "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Sec. 8(b); 60 STAT. 242, 5 U.S.C. § 1007(b). The letter telling appellant he was dismissed, but not telling him why, was evidently not "a written statement of the decision" as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given no safeguard is provided. *Cf. Mulligan v. Andrews*, 93 U.S.App.D.C. 375, 211 F. 2d 28.

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[4] One of the definitions of "decision" in WEBSTER is "an account or report of a conclusion; especially of a legal adjudication or judicial determination of a question or cause; as, a *decision* of the Supreme Court.". One of the definitions in the CENTURY is "... final judgment or opinion in a case which has been under deliberation or discussion; as, the *decision* of the Supreme Court."